In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 6484

UNITED STATES OF AMERICA,
Appellant,

v.

JESSIE SMITH, Administratrix of the Estate of James W. Whitehead, Deceased
Appellee.

Upon Appeal From the United States District Court for the Western District of Washington, Northern Division

Brief of Appellee, Jessie Smith, Etc.

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STATEMENT OF THE CASE

This case arises under a contract of war risk insurance issued by the defendant, appellant herein, to one James W. Whitehead, deceased, while serving in the military forces of the United States, during the last

war. These allegations of the complaint (R. 1-2) are admitted by the defendant's answer (R. 6). The amended complaint then sets forth the fact that the deceased was totally and permanently disabled within the terms of his policy of insurance (R. 2-3), which allegations are denied by the defendant in its answer (R. 7), the denial thereof creating the issues in this case. The amended complaint contains a second cause of action, alleging maturity of the insurance therein sued upon under Section 305 of the World War Veterans Act, 1924 as Amended. All such allegations of the second cause of action are denied. The Court finding for the plaintiff on the first cause of action, it is unnecessary to refer further to said second cause of action (R. 26). After the commencement of this action the defendant, pursuant to statute, filed a petition for joinder of party defendant, to-wit: one Lilly Gladys Whitehead, originally named beneficiary (R. 9). This order was subsequently granted (R. 12), and the said Lilly Gladys Whitehead was joined as party defendant in order that her rights, if any, might be determined, the insured being deceased. Upon failure to locate said Lilly Gladys Whitehead, summons was ordered against her by publication (R. 14-15), and on failure of said defendant to appear, default was taken against her (R. 18).

From the judgment entered in favor of the plaintiff (R. 30), the defendant United States of America hereinafter referred to as "the defendant," has taken this appeal, alleging several errors, which will be argued in the same order appearing in the appellant's brief.

ARGUMENT

I.

The first alleged error is that the Court erred in overruling defendant's objection to the introduction of the Bureau ratings. It is assumed that this assignment of error is directed to plaintiff's Exhibit No. 2, which is a rating sheet made by the Bureau on January 1st, 1922, giving a compensation rating to the insured, who was then deceased. It is called to the attention of this Court that the second cause of action in this case was brought under Section 305 of the World War Veterans Act, 1924 as Amended, providing:

> "Where any person has, prior to June 7, 1924, allowed his insurance to lapse, * * * while suffering from a compensable disability for which compensation is not collected, and dies or has died, or becomes or has become permanently and totally disabled, and at the time of such death, or permanent total disability, was or is entitled to compensation remaining uncollected, then and in

> that event so much of his insurance as said uncollected compensation, * * * would purchase if applied as premiums when due, shall not be considered as lapsed * * *."

Under this Section of the Act. the plaintiff in her amended complaint, second cause of action, alleged that at the time the insured's insurance lapsed, the defendant, by and through the United States Veterans Bureau, did owe to the insured compensation sufficient to pay all premiums on his insurance, and that said compensation remained uncollected at the time of total and permanent disability as recognized by the defendant on July 27th, 1921, and also at the time of the death of the insured on September 30th, 1921, by reason whereof the insurance had not lapsed (R. 3-4).

It would seem that Congress intended that Section 305, *supra*, should be of some benefit to a veteran and, in the face of the defendant's denial to the allegation under Section 305 (R. 8), the plaintiff would be unable to prove that compensation was due and uncollected were she not permitted to introduce the rating sheets made by the Bureau for this purpose, which rating sheets showed that the deceased did have a compensable disability at all times from the date of his discharge until his death. It must be borne in

mind that the only purpose of the introduction of this document was to prove the allegation that the deceased did have a compensable disability and that such disability was recognized by the Bureau, and it has been uniformly held that before a claimant can avail himself of the benefits of Section 305 the Bureau must first have made a rating and award. See *Maddox v. United States*, 16 Fed. (2d) 390; *Armstrong v. United States*, 16 Fed. (2d) 387; *Hollrich v. United States*, 40 Fed. (2d) 739; *Berntsen v. United States*, 41 Fed. (2d) 663.

It is admitted that a rating sheet would not be competent to show total and permanent disability, but it is submitted that it is competent and, in fact, is the only possible way to prove the right to benefits accruing under Section 305. However, in the instant case the admission of this rating sheet seems not to have been prejudicial, the Court before whom the case was tried, without a jury, having made and entered its findings of fact under the first cause of action, without any reference to the exhibit now complained of.

II.

The second error urged by the plaintiff is based upon assignment of error No. II (R. 40) as follows:

> "That the Court erred in overruling defendant's objection to the introduction of Bureau reports of physical examinations of plaintiff, they being Exhibit No. __, on the ground that they were not properly identified, and on the further ground that the government had no opportunity to cross-examine the physicians who made the reports."

The assignment of error is based upon the ground of improper identification and upon the denial of the defendant's right of cross-examination of the doctors making the reports here objected to, the admission of which is claimed to be error.

In reference to the first ground for the alleged error, that is, that the document was not properly identified, the attention of this Court is respectfully called to the objection made by defendant's counsel at the time this document was offered in evidence (R. 50) that the document was not properly identified is not a part of the objection and hence is not available as an assignment of error at this time.

The purpose of an objection is to apprise the trial court, and opposing counsel as well, of possible error in the proceeding and to give the trial court an opportunity to correct such possible error and to give opposing counsel an opportunity to supply, if possible, the deficiency in the evidence to which objection is

made. Consequently, it has been held, and seems to be practically the universal rule that an appellant cannot raise an objection for the first time on appeal, nor can he present grounds of objection not first presented to the trial court. See *Louie Share Gan v. White*, 258 Fed. 798; also *Kalamazoo Rwy. Supply Co. v. Duff Mfg. Co.*, 113 Fed. 264.

The second ground of objection to the introduction of plaintiff's Exhibit 4 is that the defendant was denied its right of cross-examination. There are numerous decisions admitting of the right that records and particularly reports of physical examinations made by the Veterans Bureau should be admitted in evidence, in a war risk insurance case. See *McGovern v. United States*, 294 Fed. 108, affirmed 299 Fed. 302; *Runkle v. United States*, 42 Fed. (2d) 804; *United States v. Cole*, 45 Fed. (2d) 339; *United States v. Stamey, et al*, 48 Fed. (2d) 150; *Nichols v. United States*, 48 Fed. (2d) 293.

It is also urged in the defendant's brief, but not assigned as error, that this report is inadmissible as containing hearsay statements and self-serving declarations. If this ground of objection is available, it is submitted that it was too general to warrant reversal. If the report contains inadmissible matter as well as matter which is admissible in evidence,

an objection directed to the whole of the record is not sufficient to warrant the Court in excluding it *in toto.* And unless the Court's attention is specifically directed and the objection made to the particular part of the report alleged to be inadmissible, the Court need not consider the objection. See *United States v. Stamey, et al, supra.* However, this report was obtained by the agents of the defendant for the purpose of treating and, if possible, of curing the deceased, and such statements as are here contended to be hearsay and self-serving declarations would seem to fall within the rule permitting such evidence as history obtained by physicians for purposes of treatment, and therefore presumed to be true. It is further believed that there was no prejudice in admitting this report in view of the fact that it was made subsequently to the date on which the defendant admitted the deceased to have been totally and permanently disabled (R. 51). See *United States v. Cole, supra.*

III.

The third error argued by the defendant is that the Court erred in awarding judgment for instalments accruing subsequently to the insured's death. This alleged error appears to have been an afterthought on the part of the defendant. It was not made the basis of any objection at the trial, nor was

the matter apparently considered of any moment during the course of the trial. The judgment was O. K.'d by the attorney for the defendant as well as by the attorney for the United States Veterans Bureau (R. 32). No amendment was ever proposed, and it was not urged or suggested as ground for a new trial (R. 33) and at the time this appeal was taken no error was assigned on account thereof (R. 39-47). Subsequent to the time the appeal was allowed, an additional assignment of error was attempted to be filed and was printed as a part of the record (R. 87), assigning as error the judgment for instalments accruing after the death of the insured as violative of Section 300 of the World War Veterans Act, 1924, as amended, but the defendant's brief has departed even from this late assignment to claim error in this judgment by reason of Section 303 of the World War Veterans Act as amended. Rules of the Circuit Court for the Ninth Circuit provide:

> "The plaintiff in error, or appellant, shall file with the clerk of the court below with his petition for the writ of error or appeal, an assignment of errors which shall set out separately and particularly each error asserted and intended to be urged. No writ of error or appeal shall be allowed until such assignment of errors shall have been filed. * * * When this is not done, counsel will not be heard except at the request of the court, and errors not assigned according to this rule will be disregarded * * *." Rule No. 11.

It is felt that under this rule and under the cases interpreting this rule the error here complained of is not available to the defendant. See *Simpson v. Denver First Nat'l. Bank*, 129 Fed. 257; *Webber v. Mihills*, 124 Fed. 64; *Kreuzer v. United States*, 254 Fed. 34, certiorari denied, 39 S. Ct. 260, 249 U. S. 603, 63 L. Ed. 798.

For the purposes of this brief and not waiving our contention that this alleged error is not now available to the defendant, it is believed that it is without merit for the reason that the World War Veterans Act, Section 19, 1924, as amended, contemplates a situation where a possible interested claimant may not be available. Said Section provides in part:

> "All persons having or claiming to have an interest in such insurance may be made parties to such suit, and such as are not inhabitants of or found within the district in which suit is brought may be brought in by order of the court to be served personally or by publication or in such other reasonable manner as the court may direct."

Under this provision the named beneficiary was duly and regularly served with summons and complaint by publication (R. 16) and upon her failure to appear default was entered against her (R. 18). It certainly was not within the contemplation of Congress

that heirs of a deceased insured should be foreclosed from receiving the benefits of the insurance where a possible named beneficiary has long since disappeared and is not to be found. This Court will certainly take notice of the fact that Section 19 aforesaid was intended to accomplish some purpose and must have been intended for a situation such as has here arisen. If Section 303 is contrary to Section 19 of the Act, this Court must construe the two together and give to them the interpretation reasonably to be gathered therefrom, and the only logical interpretation is that where a beneficiary has disappeared, her rights can be adjudicated under Section 19, providing how adverse claimants might be brought into court, and the failure of this beneficiary to appear and defend her claim, if any, in accordance with the summons lawfully served upon her, in accordance with directions contained in Section 19 of the Act, forecloses her from further claim in the premises; otherwise there could never be any determination of claims arising under this Act.

IV.

The next alleged assignment of error argued by the defendant in its brief is that the Court erred in denying the defendant's motion for a non-suit. This alleged error is not assigned as such in the defendant's

assignment of errors and consequently there seems to be nothing presented to the Court for review. Furthermore, this case was tried to the Court below without a jury (R. 17), and is subject only to such review as provided by statute, as follows:

> "When an issue of fact in any civil cause in a District Court is tried and determined by the Court without the intervention of a jury, according to Section 773 of this title, the rulings of the Court in the progress of the trial of the cause, if excepted to at the time, and duly presented by bill of exceptions, may be reviewed upon a writ of error or upon appeal; and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment." 28 U. S. C. A. 75.

Under the foregoing statute a motion for non-suit, denial of which is here alleged to be error (without any assignment thereof), is insufficient to bring anything before this Court for review, except the sufficiency of the facts found to support the judgment, concerning which there can be no question.

Without waiving the objection to presentation of this alleged error, for failure to assign the same, it seems quite apparent from a review of the evidence that the deceased was totally and permanently disabled, as found by the trial judge; and it seems unnecessary to go into great detail concerning this evi-

dence. It was shown that shortly after the deceased enlisted for service he was given the usual typhus innoculation and as a result of or following such innoculation the deceased was confined to the hospital where he received a spinal puncture, and he remained in the hospital until his discharge, at which time he was given a surgeon's certificate of disability and discharged on acount of what is therein stated to be nervousness (Plaintiff's Exhibit 1). After deceased was discharged he returned to work for the Great Northern Railway Company at the place where he had been employed for two years previous to his enlistment and where he resumed his old duties with a switching crew during which time "he acted like a man that was demented" (R. 54). The same witness, Mr. H. W. Donahue, testified that this peculiarity was noticed "five or six days after he came out of the service" (R. 54). He worked along, making innumerable mistakes, some rather serious, as shown by the testimony of all the witnesses (R. 51-58), but, as stated by the witness W. H. Horton, "Being a brother, we would overlook all these things instead of turning them in to the officials * * *. The rest of the men helped him with his work" (R. 57). And, as testified to by his mother, "They called him 'Goofey' " (R. 59). There is no better review of the evidence pos-

sible than that contained in the decision of the Court (R. 72-74), who had the opportunity of seeing and hearing all the witnesses, and who heard the witness Doctor Tracy testify when in his opinion the paresis, from which the deceased died, occurred, and who likewise heard the opinion of the Doctor who upon the evidence was of the opinion that the disease was in progress when the deceased was discharged from the service (R. 63). The testimony seems rather complete in showing the deceased to have been wholly unable and wholly unfit to perform any type of labor from the date of his discharge from the Army and particularly shows it to have been unsafe for the plaintiff to have been permitted to work, and that but for the sympathy and assistance given him by his fellow-employees he would not have been able to hold the position which he did have. Employment under such conditions has been held not to be a gainful employment. See *United States v. Eliasson*, 20 Fed. (2d) 821; *Jagodnigg v. United States*, 295 Fed. 916. This case, while presenting a different disability, is quite similar to the case of *United States v. Meserve*, 44 Fed. (2d) 549. wherein the Court said:

> "We feel that it would be giving to the work record a weight and force as a matter of law which in the light of attending circumstances it does not have, to say that there is no substantial

> proof in support of the verdict * * *. The appellee is entitled not only to the most favorable aspect of the evidence which it will reasonably bear; it is also entitled to the benefit of such reasonable inferences as arise out of the facts proved."

It has been held in innumerable cases, many of which have been decided by this Court, that the mere fact that a man worked is not conclusive against a finding of total and permanent disability. And the deceased, quoting from the opinion of the trial judge:

> "In this employment he worked, with very few exceptions, with and under foremen who were personally friendly to him, one who had been a very intimate friend for fifteen years or more, a room-mate for a large portion of the time, in the City of Seattle. * * * He was unreliable, he could not perform the duties that were entrusted to him. * * * they relieved him from the work and carried him along because he belonged to the union; never made any compalint to the officers of the company, because they did not want him to lose his position."

There certainly can be no merit in the contention that there was insufficient evidence to support the finding of the Court, and it would be a useless waste of the time of this Court to further detail the evidence or to cite further cases with which this Court is already familiar.

The remaining assignments of error urged in the brief of defendant all revolve around the question of the sufficiency of the evidence and do not require further argument.

It is respectfully submitted to this honorable Court that the appeal herein is without merit; that the several allegations of error are not substantiated by the proof, and that the finding and judgment of the trial court is in all things correct, and the defendant should take nothing by its appeal herein.

Respectfully submitted,

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WRIGHT & WRIGHT, *of Counsel.*